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February 28, 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton, Acting Secretary
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Washington, D.C. 20554

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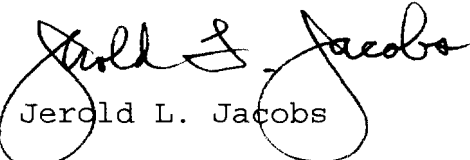
Re: **MM Docket No. 95-176**
Closed Captioning

Dear Mr. Caton:

On behalf of our clients, James J. Chladek, Cooperative TV Association of Southern Minnesota, Island Broadcasting Co., Selective TV, Inc., Teleview Systems of Minnesota, and UHF Television, Inc. (together "Six LPTV Licensees"), transmitted herewith for filing are an original and eleven (11) copies of their "Comments of Six LPTV Licensees" on LPTV-related aspects of the Notice of Proposed Rule Making in the above-referenced Docket.

Please direct any communications or inquiries concerning this matter to the undersigned.

Very truly yours,


Jerold L. Jacobs

Enc.

cc: Keith A. Larson, Assistant Chief
Joyce Bernstein, Esq.
Marcia Glauberhan (All FCC - By Hand) (w/enc.)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
) MM Docket No. 95-176
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Accessibility)

TO: The Commission

COMMENTS OF SIX LPTV LICENSEES

JAMES J. CHLADEK, COOPERATIVE TV ASSOCIATION OF SOUTHERN MINNESOTA, ISLAND BROADCASTING CO., SELECTIVE TV, INC., TELEVIEW SYSTEMS OF MINNESOTA, and UHF TELEVISION, INC. (together "Six LPTV Licensees" or "the Licensees"), licensees of Low Power Television ("LPTV") stations in Florida, Minnesota, and New York that broadcast locally-originated programming, by their attorneys, pursuant to §1.415 of the Commission's Rules, hereby submit their Comments on LPTV-related aspects of the Notice of Proposed Rule Making ("Notice"), FCC 97-4, released January 17, 1997, in the above-captioned matter. In support whereof, the following is shown:

I. Introduction

1. The Notice proposes to establish rules to implement Section 305 of the Telecommunications Act of 1996, which added a new Section 713, Video Programming Accessibility, to the Communications Act of 1934, as amended ("the Act"). Section 713 generally requires that rules be adopted by the Commission to require that all video programming be closed captioned to ensure access by persons with hearing disabilities. Importantly,

however, the Notice (at ¶63) recognizes that §713(d)(1) allows the Commission to exempt "programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming." Likewise, the Notice also notes (at ¶89) that §713(d)(3) permits a "provider of video programming or program owner...[to] petition the Commission for an exemption...upon a showing that the requirements...would result in an undue burden".

2. In keeping with the exemption possibilities outlined in §713(d)(1) and (3) of the Act, Paragraphs 63-85 of the Notice request comments on "Exemptions of Classes of Programming and Providers Based on Economic Burden," and Paragraphs 89-102 of the Notice explore "Exemptions Based on the Undue Burden Standard". As Paragraph 90 points out, the distinction between subsection (d)(1) and (d)(3) of §713 is that the former permits the Commission to exempt an entire class of programming or video provider, while the latter allows the Commission to look at specific circumstances faced by an individual video service provider and consider exemptions on a case-by-case basis. In these Comments, the Six LPTV Licensees urge, and will fully demonstrate, that LPTV stations that originate programming should be exempted as a class from the Commission's closed captioning requirements or, at minimum, liberal case-by-case exemption criteria should be established for individual LPTV stations.

II. LPTV Stations Are Economically Burdened Small Businesses That Deserve A Blanket Exemption

3. At the outset, the Six LPTV Licensees emphasize that they recognize the important public interest justifications for assisting the hearing-impaired to fully enjoy the benefits of broadcast television as provided by full-power TV stations. Indeed, Paragraphs 12

and 13 of the Notice present numerous statistics which show that "[v]irtually all nationally broadcast programming, both commercial and noncommercial, contains closed captions" and that "[t]he majority of programming on each of the commercial broadcast networks also is already closed captioned". Of course, such data do not address the technical and economic difficulties faced by local-originating LPTV stations, which are neither network-affiliated nor involved in "nationally broadcast programming".

4. The Six LPTV Licensees strongly disagree with the Commission's tentative conclusion in Paragraph 85 of the Notice that a "blanket exemption even for very small providers [such as LPTV stations] is unnecessary, because...all classes of providers appear to have the technical capability to deliver closed captioning to viewers intact". Indeed, the essence of the Licensees' objection is actually anticipated in Footnote 165 of the Notice, which immediately follows the Commission's no-blanket-exemption conclusion, and states that the Commission seeks comments regarding the "burden [of the closed captioning requirement] on small entities" in terms of the requirement in §257 of the Act for the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services". More specifically, the Commission has already declared in its video-related MM Docket No. 87-268 DTV proceeding that: "[M]ost, if not all, LPTV stations...could be classified as small businesses";¹ "[A]ll...

¹ See Fourth Report and Order in MM Docket No. 87-268 (DTV), FCC 96-493, p. 34, released December 27, 1996.

[LPTV] stations have revenues of less than \$10.5 million;² and "[U]p to one-third of all LPTV stations...may have to cease operation to make way for DTV stations".³

5. In short, given these tentative conclusions by the Commission in the DTV proceeding, the Six LPTV Licensees submit that the Commission already has acquired sufficient knowledge and data to support the conclusion that a blanket exemption from the closed captioning requirement should be granted to the entire video provider "class" of LPTV stations. The LPTV industry is threatened with economic disaster by the potentially devastating effect of the proposed DTV Table of Allotments in the Sixth Notice, supra upon LPTV usage of frequencies. Even without this dire threat to LPTV stations' very existence, their general economic and technical inability to provide the personnel and equipment necessary for closed captioning of LPTV local originations is obvious. To saddle the LPTV industry with a severe new economic burden at this especially perilous time will undoubtedly force many local origination activities to cease and LPTV stations to operate in translator/retransmission mode.⁴ Such a result would be contrary to the primary public interest justification for establishing the LPTV Service, namely fostering low-cost local program originations and new and special-interest TV programming in urban, suburban, and rural areas. See Notice of Proposed Rule Making in BC Docket No. 78-253, 82 FCC 2d 47, 48-49, 55-58 (1980). Hence, the Commission should

² See Sixth Further Notice of Proposed Rule Making in MM Docket No. 87-268 (DTV) ("Sixth Notice"), 11 FCC Rcd 10968, 11063 (1996).

³ See Sixth Notice, supra note 2, at 11065.

⁴ In Paragraph 90 of the Notice, the Commission presciently expresses concern about such a result, stating that "Congress intended to permit the Commission to balance the need for closed captioned programming against the possibility of inhibiting the production and distribution of programming and thereby restricting the diversity of programming available to the public".

grant a blanket exemption to all LPTV stations that originate local programming.

III. Alternatively, A Liberal Case-By-Case LPTV Exemption Policy Should Be Adopted

6. In the event that the Commission does not grant a blanket LPTV exemption from the closed captioning requirement, the Six LPTV Licensees urge that a low evidentiary threshold should be established for demonstrating "undue burden" in order to qualify LPTV stations for a case-by-case exemption. Importantly, the §713(d)(3) facet of this proceeding does not concern a rule "waiver" -- to which the "high hurdle" waiver standard of WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), would apply -- but rather an "exemption" based on a station's particular circumstances. Compare Paragraph 90 of the Notice and the text of §713(d)(3) of the Act (both of which use only "exemption" terminology) with Paragraph 99 of the Notice (which asserts that the exemption process would permit the Commission to grant a "partial waiver or temporary waiver"). The Six LPTV Licensees urge that the Commission should not use the terms "exemption" and waiver interchangeably in this proceeding and should eliminate all references to waivers, lest WAIT Radio's more stringent "high hurdle" considerations become part of an LPTV station's evidentiary burden when seeking an individual exemption.

7. In identifying relevant exemption factors, the Commission correctly states (Notice at ¶90) that the language in §713(e), defining "undue burden," does not limit the Commission to "considering only...[the four stated] factors, but rather seems to invite the consideration of other relevant factors". In addition to the statutory elements concerning cost, impact on station operations, station resources, and type of operation, the Licensees urge that the Commission should also weigh information about geographic and market location, number and type of other

available mass media, estimated audience size, and any other unique public interest factors that pertain to the LPTV station.

8. Finally, as suggested in Paragraph 98 of the Notice, the Six LPTV Licensees recommend that any case-by-case exemption procedures adopted by the Commission should minimize administrative costs and allow for quick and efficient resolution of exemption requests. Hence, the Licensees disagree with the view expressed in Paragraph 99 of the Notice that the procedure should involve "public notice and opportunity for public comment" on exemption requests. LPTV stations do not have the same operating and regulatory requirements as full-power TV stations and should be exempt from the proposed new procedural rigors, which, if at all appropriate, should apply only to exemption requests by full-power stations. Likewise, any detailed financial showings made by LPTV stations should be treated confidentially by the Commission to prevent anticompetitive abuse of proprietary information and needless public disclosure. Again, other standards may be appropriate for full-power stations seeking exemptions.

IV. Conclusion

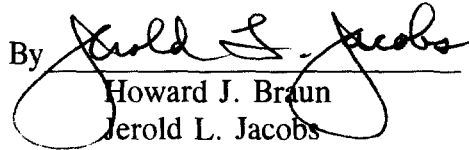
9. The existing public record in various pending video-related Commission proceedings fully demonstrates that locally-originating LPTV stations tend to be economically marginal operations that are now threatened with regulatory extinction. Thus, at the present time, LPTV stations are not the right type of "video provider" to be subjected to the equipment and personnel expenses necessary to meet a closed captioning requirement. A blanket exemption should be given to the entire LPTV industry, or, at minimum, the Commission should adopt liberal and simple standards for the case-by-case examination of LPTV exemption requests.

WHEREFORE, in light of the foregoing, the Six LPTV Licensees respectfully request that the Commission should grant a blanket exemption from closed captioning requirements to all LPTV stations or, at minimum, should adopt liberal standards for individual LPTV station exemption requests.

Respectfully submitted,

JAMES J. CHLADEK
COOPERATIVE TV ASSOCIATION OF
SOUTHERN MINNESOTA
ISLAND BROADCASTING CO.
SELECTIVE TV, INC.
TELEVIEW SYSTEMS OF MINNESOTA
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Dated: February 28, 1997